

No. 11794

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSHUA HENDY CORPORATION, a corporation,

Appellant,

vs.

LOUISE E. MILLS, Administratrix of the Estate of Thomas
C. Mills, deceased,

Appellee.

PETITION FOR REHEARING.

THELEN, MARRIN, JOHNSON & BRIDGES,

SAMUEL S. GILL,

ROBERT H. SANDERS,

1004 Pacific Southwest Building, Los Angeles 14,

Attorneys for Appellant.

FILED

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*To the United States Circuit Court of Appeals, Ninth
Circuit, and the Judges Thereof:*

Comes now Joshua Hendy Corporation, the appellant in the above-entitled cause, and presents this, its Petition for Rehearing of the above-entitled cause, and in support thereof respectfully shows:

1. The Court in its opinion has based jurisdiction under the Portal-to-Portal Act upon the provisions of a Union agreement which was not introduced into evidence during the trial and which is not a part of the record before this Court. The provisions of such Union agreement were first brought into the case as an appendix to Appellee's

brief. Upon oral argument, Appellant's counsel referred to such contract provisions. He was stopped by the Honorable Justice Mathews and told that the Court would not consider a contract which was not part of the record. At such time, Honorable Justice Mathews made it clear to counsel that discussion of the contract would be a waste of time. With due respect for the Court's instruction, Appellant's counsel refrained from discussing such contract provisions and as a result was denied the privilege of pointing out to the Court wherein said provisions of the Union agreement were insufficient to create jurisdiction under the Portal-to-Portal Act.

2. The decision of the Court in this cause is of vital importance to employers and employees throughout the country by reason of the fact that practically all Union agreements which have been in effect during the past several years include provisions that overtime shall be paid for all work performed in excess of eight hours per day. If such provision is considered to be an express provision making any activity compensable, the Portal-to-Portal Act failed to accomplish what Congress intended it to do, for employees working under such Union agreements may assert that any activity they were engaged in was "work" within the meaning of the contract. The Portal Act was enacted so as to remove from the Courts the jurisdiction to determine the meaning of "work." As a consequence of not permitting argument concerning the contract, this Court did not have an opportunity to consider the following cases which are contrary to its decision: *Battery Workers Union v. Electric Storage Battery Co.* (U. S. D. C. Pa. 1948), 14 CCH Labor Cases, par. 64,298; *Millett v. Bethlehem-Hingham Shipyard* (U. S. D. C. Mass. 1948), 15 CCH Labor Cases, par. 64,590.

3. The Court based its opinion on two paragraphs of a contract which was not a part of the record. This contract contains twenty-three paragraphs. A full and proper consideration in this case requires a study of the entire contract.

Dated: September 30, 1948.

Respectfully submitted,

THELEN, MARRIN, JOHNSON & BRIDGES,
SAMUEL S. GILL,
ROBERT H. SANDERS,

Attorneys for Appellant.

Certificate of Counsel.

I, Samuel S. Gill, counsel for the above-named Joshua Hendy Corporation, appellant in this action, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for delay and, in my judgment, is well founded.

SAMUEL S. GILL.

Dated at Los Angeles, California, September 30, 1948.